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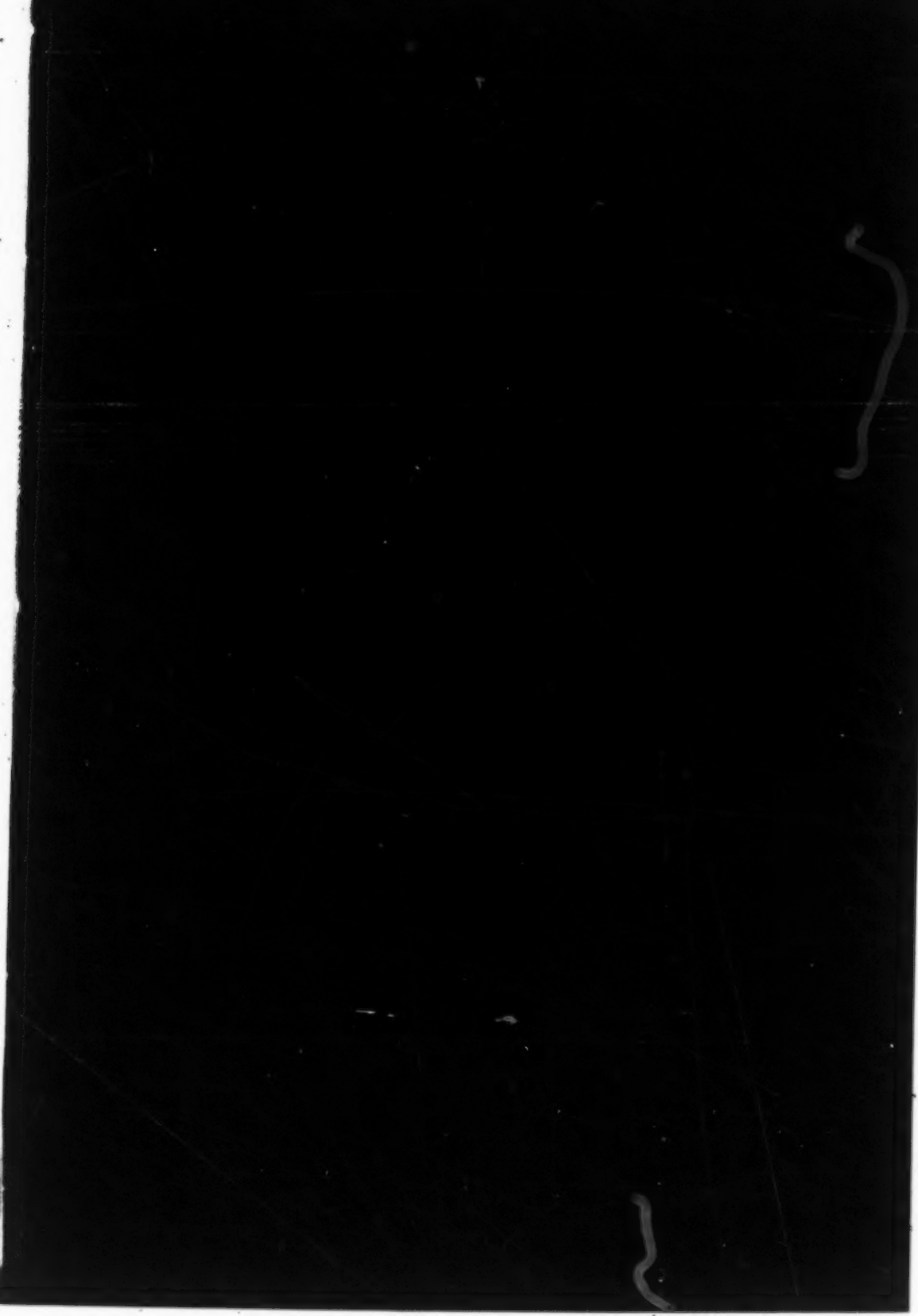

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 531.

LEO NEBBIA,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BRIEF FOR APPELLEE.

We present no jurisdictional question. Possibly the appellant should have directed his appeal to the judgment of the Monroe County Court entered after affirmance by the Court of Appeals (R 29, 30), instead of directing his appeal to the judgment of the Court of Appeals (R 5, 6, 7) which was merely of affirmance and remittitur (R 29). That is the interpretation which formerly was placed upon Judicial Code §237 (now U. S. Code, Title 28, §344). See for examples, *Nicchia v. New York*, 254 U. S. 228; *Radice v. New York*, 264 U. S. 292; *Barnes v. New York*, 266 U. S. 581; *Weller v. New York*, 268 U. S. 319. It does not appear that any change in that respect has been made by the Act of Jan. 31, 1928 (U. S. Code, Title 28, §861-a). See *Lewis v. New York*, 289 U. S. 709. However that may be, nothing of substance has been omitted relative to the present appeal and its intent is clear.

Importance of the Appeal.

The facts presented, considered by themselves, are trivial and even frivolous. A small storekeeper of Rochester has sold two bottles of milk for eighteen cents, the minimum price established by the Milk Control Board, and with it as an inducement to its sale he has given away a loaf of bread worth five cents. For this offense against society he has been fined five dollars. At first glance there seems to be nothing in this transaction to occupy the time of a high appellate court.

The importance of the case derives from the defense which was interposed.

New York State is the richest and most populous State of the United States, and its dairy industry affects more people than any other business in the State. In the supposed interest of that dairy industry and public welfare generally New York State very solemnly enacted a law under which minimum prices for the sale of milk are established. The criminal action is a means of enforcing compliance by this small storekeeper. He has submitted to the courts, as his defense, that this legislation, although it represents the present will of his fellow-citizens, is unreasonable and arbitrary, and forbidden by certain provisions of a written constitution.

Small as may be the material interest of the defendant, it becomes a very important thing when thus set up as an obstacle to carrying out a state program, and the defendant is entitled to have his constitution-

al right as seriously considered before this Court as any common interest of all the People of the State of New York. In such a litigation there is no big and no little.

Only Question Is Constitutionality of Statute Under Due Process Clause of Fourteenth Amendment.

We note that Point II of Appellant's Brief in this Court, and the Assignments of Error, numbers 4, 5, 6 and 8 (R 7, 8) are directed to the Order of the Milk Control Board rather than the statute. No argument suggesting that the Order might be invalid irrespective of the statute was made before the Court of Appeals, or (so far as we know) before any court below. Although the constitutional objections urged before the Rochester City Court were directed to "the statute and order" (R 11), no distinction seems to have been made between them. No question except as to the statute was suggested in the Petition for Appeal (R 6).

If we believed that any question were before this Court as to the reasonableness of the order, insofar as it allows grocers to make cash-and-carry sales only one cent below the price for doorstep delivery, we could find plenty of material to justify it (Report, 238, 246, etc.). We could show that this differential merely recognized the prevailing practice in Rochester, New York City, and most other cities in New York State; that it has given general satisfaction to grocers, particularly as the federal policy expressed in several milk marketing agreements, and the policy under the

Ohio Milk Distribution Law, has been to require the grocer to sell at the delivered price; and that there is a considerable body of trade and consumer opinion supporting this differential.

We believe there is no such question here. It was not raised below in accordance with correct appellate practice, and neither was it raised in the manner provided for in the statute in question.. See ch. 158 of N. Y. Laws of 1933, hereinafter called the Milk Control Law, made an appendix to appellant's brief, §312 (f). This provides that the Milk Control Board shall give a public hearing upon reasonable notice before "making, revising or amending any order fixing the price to be paid or charged for milk", and that:

> "Such order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order."

If appellant did not like the one cent differential provision of Order Number Five he should have pursued the remedy provided under the statute. *Collins v. Texas,* 223 U. S. 288; *Gorham Mfg. Co. v. Tax Comm.,* 266 U. S. 265. This action would not have estopped him from challenging both the statute and an adverse order under it. *Buck v. Kuykendall,* 267 U. S. 307.

Parts of the Statute Directly Involved.

The constitutional question presented is limited by the facts of the case to the constitutionality of fixing minimum prices at which milk can be sold to consumers. Other provisions of the statute, such as those for

licensing milk dealers and holding them to certain standards of conduct (§308), and the provision authorizing the establishment of minimum prices on sales from producers to dealers (§312-d), and the provision authorizing maximum prices on sales to consumers (§312-a, b), depend upon somewhat different considerations as to the public welfare, which will not be argued now.

That the other provisions of the statute are separable from the minimum-price-to-the-consumer provision now involved is indicated by various circumstances. Section 316 of the statute is the common provision that invalidity of one provision shall not invalidate the whole statute. This at least encourages the idea of separability. *Champlin Rfg. Co. v. Commission,* 286 U. S. 210, 235. The Report of the Pitcher Committee (N. Y. Legis. Doc. No. 114 of 1933, hereinafter referred to as "Report" followed by page number) at page 17 shows that fixing minimum prices to consumers was regarded merely as one of several possible remedies. See also the Report at page 18, title 7-d-3. The minimum-price-to-the-consumer provision was not in the bill as originally reported (S. Pr. No. 991) and was added by an amendment (S. Pr. No. 1896). The practical ineffectiveness of construing this provision as mandatory is such that we believe the courts of New York State will not so construe it, notwithstanding its apparent choices between "shall" and "may". *(Matter of Rutledge,* 162 N. Y. 31; *People v. Karr,* 240 N. Y. 348.) Nobody has suggested that the Board is compelled to establish minimum prices, and it has established none for small communities.

The other provisions of the statute will need to be studied to learn the place in the general statutory plan held by the minimum-price-to-the-consumer provision, and hence its justification and significance, but the provisions which now are directly involved are the following:

§312. *Order fixing price of milk.* (a) The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:

1. By milk dealers to consumers.

2. By milk dealers to stores either for consumption on the premises or resale to consumers.

3. By stores to consumers except for consumption on the premises where sold.

4. When, pursuant to statute, regulations adopted thereunder, or ordinance, various grades of milk are specified, the board shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable.

(c) It is the intent of the legislature that the public emergency requires that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers.

* * * *

(e) After the board shall have fixed prices to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

Legislative Findings of Fact.

This 1933 statute received a great deal of attention from the Legislature during the eight weeks it was pending, and before that the entire matter had been carefully investigated and considered by a special legislative committee. This committee, which became known as the Pitcher Committee from the name of its chairman, acted under a joint resolution of March 10, 1932, which instructed it:

"* * * to investigate the causes of the decline of the price of milk to producers and the resultant

effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State * * *'' (Report, 9).

The Report, copies of which will be submitted to the Court, vouches for the intelligence, thoroughness and sincerity with which the Committee conducted its investigation. A preliminary report, consisting of the ''Conclusions and Recommendations'' (see Report, 13-23) and some other material, was filed February 13, 1933, and printed as N. Y. Legis. Doc. No. 59 of 1933. The final report in mimeographed form was available somewhat later, and is now in print consisting of 473 pages. It is probably the most thorough and best organized report ever presented of the actual functioning of a great milk market. The following findings are main headings among its Conclusions and Recommendations:

''1. The production and distribution of milk in this state is a paramount industry and affects in a large measure the health and prosperity of the people of the state. It is the duty of the state to take such measures as are necessary and reasonable to preserve this vital industry.''

''2. The financial situation of dairy farmers in the state is desperate and has grown increasingly critical during the period of the Committee's investigation.''

''3. The principal causes of the extremely low prices paid to producers for milk are: The unprecedented decline in the general level of prices; a periodic increase in the number of cows and in milk production; the prevalence of unfair and destructive trade practices in the distribution of milk leading to a demoralization of prices in the metropolitan area and other markets and the failure of charges for transportation and distribution to be reduced

in proportion to the reduction in retail prices of milk and cream."

"4. The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control."

"5. Among the remedies which might be applied to mitigate the evil of price-cutting are: Universal application of the classified price plan with uniform prices to all milk dealers for milk utilized in each classification; the fixing of minimum prices to be charged by milk dealers for milk and cream sold to consumers and other customers; the imposition of a graduated tax to be paid by milk dealers on their sales of milk and cream in excess of the normal or average proportion of the milk supply of the entire milk shed which is sold by the dealers in fluid form."

"6. Universal application of the classified price plan and control of surplus milk by the producers through effective cooperative organization appears to offer the best prospect for permanent stabilization of the dairy industry in the New York milk shed."

"7. As an emergency measure, a temporary milk control board should be created, with broad powers to regulate and stabilize the milk industry as well as may be done under the circumstances. This board should also foster and promote the more complete organization of the producers as outlined above."

Each one of those seven conclusions is supported by subheadings indicating the reasoning and data which justify it. The remainder of the printed Report is a careful analysis of the evidence (2350 typewritten pages besides the exhibits) which was before the Pitcher Committee. This leads up to the Bill (Report, 367-379) which became the statute now involved. The opening section of that statute is as follows:

"§300. *Legislative finding; statement of policy.* This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination."

Evidence Supporting the Findings

For present purposes a legislative finding is not unlike the verdict of a jury. It is entitled to respect, and will stand if it is bottomed upon evidence and not clearly against the weight of it.

We submit that the New York Legislature was justified in enacting the particular statutory provision now involved, the minimum-price-to-the-consumer provision, if it had before it evidence which established the probability of three things. *First,* that a serious condition existed affecting the production and distribution of milk, and amounting to a public emergency. *Second,* that the milk business is affected by conditions peculiar to itself so that it could not be cured by operation of the law of supply and demand. *Third,* that price-cutting in the sale of milk from stores to consumers was a substantial contributing factor to the serious situation in the milk business.

(a) *Evidence of an emergency.*

The simple fact was that the price paid New York State farmers in the spring of 1933, for milk produced under the exacting health standards of the present day, was the lowest price since 1896. From March 1929 to March 1933 the producers' price for fluid milk was reduced 61 per cent (Report, 15, 41, 44, 96). A dairy farmer, particularly one who was in debt, or who had any sort of fixed costs, was helpless. A vital fact in the dairy industry, well known to everyone, was stated by a witness as follows (Report, 61):

> "The factory, when it begins to run in the red, shuts down or shuts down partially, but the farm cannot do that. The cows continue to produce milk, and something must be done with that milk, even if it is not bringing in any income."

Foreclosures and tax sales became common in every dairy community (Report 61-70). The past history of the dairy industry in New York State and elsewhere showed that such conditions were liable to cause a milk strike. There had been such strikes in New York State in 1883, 1916 and 1919 (Report, 100, 103). A progressive dairyman in western New York summed up the situation as follows (Report, 66):

> "The so-called marginal man is in despair, and the margin is drawing nearer and nearer to the center every day."

A very respectable and conservative dairyman from northern New York said that a violent strike was imminent (Report, 75). His forecast was realized by a strike in the Rochester area in March 1933 which cost the lives of two persons, a trooper and a striker, and the destruction of much property. A more widespread and equally violent strike occurred in New York State in early August 1933. See Message from Governor Lehman to the Legislature, August 4, 43 State Dept. Rep. 530. Before that strike cleared the air, powerfully aided by the fact that the benefits of the Milk Control Law were becoming generally apparent, strike threats were continuous. The distinguished editor of the New Outlook, in an editorial for June, 1933, said:

> "The milk producers are one of the most harassed and desperate groups of farmers in the country."

Similar conditions prevailed in all of the principal dairy states. See, "Milk—The Problem on your

Doorstep," by John Dreier and Kendall Foss, page 37 of New Outlook for October, 1933.

The Report did not overstate the situation presented to the New York Legislature last April when it said (page 11):

> "The very inadequate price for milk is resulting in a desperate situation among many farm families. * * *. Returns to producers of milk much below the cost of production eventually must lead to a reduced supply of milk which meets the accepted standards for consumption in the cities of the state. An immediate danger is the interruption of the milk supply by strikes and violence. Recent and present happenings in the Rochester milk shed and evidence received by this Committee indicate that the danger is immediate, the necessity urgent and such as will not admit of delay in public supervision and control."

(b) *Evidence that because of peculiar conditions in the milk industry the emergency would not be self-curative.*

All during 1932 the price paid New York State farmers for milk was less than the cost of production (Report, 46-60, 14). This had no appreciable immediate effect upon the quantity produced (Report, 85, 86). Its only immediate effect was to render it difficult to enforce sanitary standards of production (Report, 70-74). Its effect for reducing production will be experienced most fully about seven years hence and it probably will be exaggerated beyond any proper relation to present needs or needs of that time. This is because dairying is a biological industry, requiring several years for adjustments of increase or decrease, which causes such adjustments to be delayed and violent. This

phenomenon is commonly referred to as the "dairy cow cycle" (Report, 16, 39, 60, 68-69, 73, 76-77).

Consumption of milk is as unresponsive to price as is supply. A hot day may increase consumption, but the customary price continues; conversely cheap milk does not stimulate consumption to any great extent (Report, 38, 39). The report of the Ten Eyck Committee in 1927 (see Report, 139) studied the effect of price changes on demand for milk in New York City from 1919 to 1924, and found that during that period Grade B quarts had been reduced one cent on 11 different occasions, but the net increase in consumption measured five weeks after each change averaged only six-tenths of one per cent. Similar experience was noted as to Grade A quarts and Grade B bulk and a more favorable experience (1.7 percent increase) as to Grade B pints.

The "classified price plan", by which more than half of New York State milk has been purchased since 1920, and which affects the prices paid for the balance (Report, 109-113, 160), is another factor which interferes with any tendency of prices to regulate production. Milk used for fluid purposes is paid for at a greater price than milk used for manufacturing purposes. The latter is usually called "surplus" milk and some of this is necessary to service the market. The price that a farmer receives may depend more upon his success in marketing a greater percentage of his production in the fluid class than upon the volume of surplus produced (Report, 159, 160). Even though increased surplus affects adversely the price for milk to producers as a class, each individual producer may

hope to escape its effect and many will succeed (Report, 16). This same point is made in "A Lesson from the Milk Industry," printed in the National City Bank bulletin or letter for January, 1933, page 14.

The introduction of long term credit into any business makes it more difficult to effect adjustments between production and demand. Dairying has its fair share of that problem. The total indebtedness of $160,000,000 on New York State dairy farms was mostly contracted before 1931 (Report, 13, 31). That was much less than a year's income from dairying in 1929, much more than the income in 1931 (Report, 29), and probably almost double the income for 1932. Taxes are another fixed charge which make it difficult for the farmer to respond to a lowered price of milk by reducing production (Report, 31-32). Real property is the largest element of dairy farm capital (Report, 31) and real property is under pressure from taxes whether or not it is in use for production.

The tendency of the milk distribution business to monopoly is another reason why the interrelation of consumer demand and producer supply sometimes cannot be trusted to work out a satisfactory price relationship. There is no city in New York State where any one company has a monopoly or near-monopoly of the milk business, but the tendency has been for the number of distributors to decrease and a few companies to emerge as the dominant factors in each market (Report, 165, 180).

In New York City three companies handle approximately two-thirds of the total milk supply, and this

condition is usual in other cities (Report, 165). A very large percentage of retail business in New York City is controlled by Borden's Farm Products Company and Sheffield Farms Company (Report, 166) and this is the situation to which the New York Times referred editorially in its issue of September 3, 1933, when it said "the tendency has been toward monopoly—or duopoly."

There has been some recent tendency to increase distributors, but "these conditions probably are temporary and the trend toward fewer and larger distributing units may be expected to continue with the return of more normal conditions in this industry" (Report, 167). Even among the smaller units in the industry there is a possibility that monopolistic tendencies will be realized through milk dealers associations (Report, 167-173). The larger units have tended to organize through holding companies on a national scale (Report, 173-179). In the past the milk industry in New York State has shown strong monopolistic tendencies (Report, 100-101, 299; *People v. Milk Exchange*, 145 N. Y. 267.)

The situation as to monopolistic tendencies is summarized in the Report, page 20, as follows:

> "At present competition in the business of milk distribution in most cities of the state is keen to the point of being wasteful and destructive. On the other hand, there has been over a period of years a marked tendency toward fewer and larger distributors. This tendency, though temporarily interrupted by unusual conditions, may be expected to continue when conditions are again stabilized."
>
> "Milk dealers in most cities have learned to cooperate to a certain extent for the solution of mu-

tual problems * * * The power resulting from such concerted action, if abused, could readily be subversive of the public interest."

"In the past ten years large corporations have developed, embracing numerous subsidiary companies engaged in the handling and distribution of dairy products. The two largest of these corporations, having vast resources and widely scattered operations, play an important part in the handling of milk produced in this state."

Milk distribution is an industry of decreasing costs to an extent which makes it a natural monopoly of organization. (For discussion of this terminology, see Patterson & Scholz, "Economic Problems of Modern Life", page 169. See also Sumner H. Slichter, "Modern Economic Society", 317-324.) It has heavy fixed expenses (Report, 21, 32, 164) with the possibility of greatly cutting down operating expenses per unit by doing a large volume business (Report, 301-303, relative to Rochester, and 324, as to comparison between Ottawa and Toronto). Dr. Leland Spencer, in a mimeographed report to the N. Y. S. Milk Control Board under date of October 17, 1933, as to "Milk Distributors' Costs and Profits", concludes from statistical material obtained by a recent survey:

"In general the largest distributors are the ones which would survive longest under unfavorable conditions. This is evidenced by the fact that while 22 of the 30 New York distributors reported losses in the 3-months period of 1933, only one of the five largest companies failed to make any profit. Also while nine of the 22 distributors in the larger upstate cities reported losses for the same period, none of these were among the five largest companies. The companies whose figures are included in these summaries are for the most part the largest in the several markets. They have

> the important advantage of large volume operations and the opportunity to employ skilled management. Ordinarily these companies would show lower costs and larger profits than the average for the entire industry."

Other factors peculiar to the fluid milk industry are referred to in the Report of the Pitcher Committee (pages 15, 16) and some not mentioned there are part of common knowledge. Producers are not merely unorganized but are split into bitterly hostile groups; milk is mostly delivered without an agreed price and paid for a month or two later so that the buyer is really a selling agent free from fiduciary obligation; many producers go unpaid (Report, 362). The New York Legislature had justification for concluding that the dairy emergency presented to it in April 1933 would not be self-curative and called for special methods of control. It did so conclude, not only by its Conclusion number 4 (previously quoted) but also by the following (Report, 15, 18):

> "Unsettled market conditions have led to price wars among distributors which have caused reductions in retail and wholesale prices below the point justified by the supply and demand situation. Unfair and destructive trade practices have been more violent and more serious than usual in their effect upon the price structure."
>
> "It is clear that in these abnormal times the economic law of supply and demand cannot be relied upon either to insure the consumers of a continuous and adequate supply of pure and wholesome milk, or to prevent grave injury to this important industry and its possible disintegration."

(c) Evidence that price-cutting in sales from stores to consumers was a serious factor.

The Report concluded that the fixing of minimum prices to be charged by milk dealers for milk and cream sold to consumers and other customers was a remedy which might be applied to mitigate the evil of price-cutting, but would strike directly at the evil without removing its cause (Report, 17). To understand why it regarded this as a measure for relieving an emergency as to producer prices, some knowledge of the actual functioning of the milk distribution business is necessary. The following are direct quotations from the Report (pages 95-97):

> "The most definite information which the Committee received on the subject of price-cutting by dealers is that supplied by a survey of the purchases and sales of milk by retail stores in New York City. This information is reported in a later section (page 239). It shows a wide variation in the prices at which milk is sold to the stores and in their retail price to consumers.
>
> "Evidence of the effect of price-cutting is found in the reduced premium paid for fluid milk over its butter value, by dealers purchasing their milk on the classified price plan (table 34). The average premium paid for milk sold in fluid form during the 5-year period 1927-1931 was $1.53 per 100 pounds. In 1932 this premium averaged only $1.06 per 100 pounds and for March 1933 it is reduced to $.68.
>
> "The principal cause of the reduced premium for fluid milk is price-cutting on the part of dealers who share little or none of the burden of surplus milk. Their practice is to purchase milk at approximately the same price which the Sheffield Farms Company pays for all milk including a large percentage of surplus. In effect, therefore, the dealer without surplus obtains his fluid milk

at a much lower cost than those dealers who handle surplus milk or who buy on the basis of a classified price and pay a premium for the milk which they sell for consumption in fluid form. During 1932 the Sheffield price for all milk including surplus was $1.30 per 100 pounds. The average price which Borden's Farms Products Company and other League buyers paid for fluid milk not including surplus was $1.77 per 100 pounds. This difference of $.47 per 100 pounds is the competitive advantage enjoyed by a dealer having no surplus, a condition which is typical of the great majority of the smaller dealers selling milk in New York City.

"This competitive advantage on the part of dealers having little or no surplus milk is generally dissipated in price concessions to customers as shown by the results of the store survey in New York City. The opportunity for price-cutting from this cause varies with the spread between the retail price in the city and the prices returned to farmers by the Dairymen's League and the Sheffield Farms Company. This spread in turn is determined to a large extent by the amount of surplus milk in the milk shed. When the surplus is small, the price received by farmers approaches the price which the larger dealers pay for fluid milk. When the surplus is large, there is a wider spread between the fluid milk price and the blended price returned to farmers. At such times the dealer handling only fluid milk has the greatest advantage and price-cutting is most rampant. The only way in which the Dairymen's League and the Sheffield Farms Company can protect their trade outlets under such conditions is to reduce the spread between the retail price and the value of surplus milk. That is the condition which has prevailed in the past year or longer and which accounts for the small premium over butter value which is paid for fluid milk."

The following are direct quotations from the material about store sales in New York City, referred to

at the beginning of the above quotation (Report, 246-257):

> "It has been stated on numerous occasions in the past year that the sale of milk at low prices by retail stores was a disturbing factor, tending to force the price of all milk to a lower level. Loose milk has been sold out of stores in New York during the past few years at prices ranging as much as five cents or more per quart below the price of Grade B bottled milk on retail milk routes. Prior to 1932, however, the price of bottled milk at stores was held rather closely in line with the prices on the routes."
>
> * * * *
>
> "Some striking changes are noted in the selling prices of Grade B bottled milk (table 98). At the time of the 1931 survey more than 70 per cent of the stores were selling at the established price on retail routes. In 1932 less than 10 per cent of the stores were getting as much as the retail price on routes, 42 per cent were selling at a discount of one cent, 25 per cent at a discount of two cents, and 20 per cent at a discount of three cents from the route price. The greatest disparity between store prices and route prices was found in Brooklyn and Queens where more than half the stores were selling at a discount of three cents or more per quart from the route price."
>
> * * * *
>
> "Many charges and counter charges have been made during the past year in respect to the responsibility for price-cutting in the sale of milk to stores in New York City. It is common knowledge that the two large companies make relatively fewer concessions from established sales prices than do the smaller distributors. The principal reason for this difference is that their milk is sold under well known brands or trade names which have come to signify extra value in quality and service. Stores find it to their advantage to carry these brands of milk because they are so often called for by the customers. Another reason may

be that these larger companies are interested primarily in retail distribution and do not care to take on more wholesale business unless it will pay its way. * * *"

"Strangely enough, the price concessions apparently are made quite as often to the stores handling a small volume, as to the larger stores. The average sales per store were lower in the group receiving price concessions than the general average for all the stores (table 105 and table 89). Where individual cases are examined, it becomes apparent that some of the smallest stores obtained concessions as readily as the larger ones (tables 106, 107 and 108)."

It is respectfully submitted that the New York Legislature was justified in concluding that there is an actual relationship between a few cents cut in price upon a sale of milk from a city grocer to a consumer and the dairying counties of the State plunged into distress. Admittedly this legislative provision was directed to a symptom, and the Legislature did not regard this measure as a cure, but it was an important item in the treatment prescribed.

Similar Laws in Other States.

The ills of New York State are not imaginary or peculiar to its people, and it involves a considerable responsibility to say that the remedy prescribed by this law is unreasonable. Other States are experiencing the same ills, and are attempting the same remedy.

The Province of *Manitoba*, Canada, by its Public Utilities Board, has been regulating the price of milk, including minimum prices by dealers and stores to consumers since September 1932 without litigation.

The Province of *Alberta* in March, 1933, following an inquiry into milk distribution in 1932, amended its Public Utilities Act to regulate prices of milk and other farm products under certain conditions. We have no information as to what action has been taken under that amendment.

The Province of *Quebec* and also the Parliament of *Canada* have been studying the problem of milk regulation during the past year. See "Milk", by A. L. Oakhurst, in XIII Canadian Forum (July 1933) page 368.

In *England,* on January 27, 1933, the Reorganization Commission for Milk filed a printed report of 228 pages. It recommended price regulation under authority of the Agricultural Marketing Act, and we are informed that such regulation is now effective.

Wisconsin commenced in December, 1932, to fix prices of milk sold in Milwaukee, and has conferred more explicit power upon its Department of Agriculture by ch. 64 of the Laws of 1933. Under that authority price regulations have been continued for Milwaukee and recently initiated for Madison, in each case including minimum prices for sales from stores to consumers. This law declares the existence of a public emergency and provides that, "all increases in retail prices shall go to the producer." In the case of *Gladstone Dairy v. Hill,* decided by the Circuit Court of Dane County on June 27, 1933, constitutionality of that law was sustained. A long opinion was written by Judge A. G. Zimmerman, which is printed in the Wisconsin State Government Service Journal

for July 15, 1933. For an account covering the last twelve months see "Regulation of Milk Marketing in Wisconsin", IX Journal of Land & Public Utility Economics (August 1933) page 317.

New Jersey has enacted a law which is a very close copy of the New York statute. This is ch. 169, N. J. Laws of 1933, signed May 21. Orders have been issued under it fixing minimum prices at which milk and cream can be sold, including sales from stores to consumers. The recital which introduces this law refers to the distress of farmers producing milk for consumption in New Jersey, mentions that such distresses in various other communities have resulted in milk dumping and riots, in some cases to such an extent that the public has been denied a sufficient supply of good wholesome milk, and concludes that the act is an emergency law, "necessary for the immediate preservation of the public peace, health and safety." The duration of the law is until July 1, 1935.

Connecticut enacted in May, 1933, as ch. 226, an act creating a Board of Milk Control, with power to fix minimum prices for milk and cream, including sales from stores to consumers. That power has been exercised by several orders. On August 2, 1933, in the case of *Diorio v. Morris* the Superior Court of New Haven County refused to hold the law unconstitutional. An opinion of a few pages was written by Judge Arthur F. Ells, relying principally upon *People v. Nebbia.*

Florida on June 12, 1933, enacted a law which is a close copy of the New York statute, but apparently has

used it none or little. A letter from the Attorney General of Florida indicates that the law was held unconstitutional by a court of original jurisdiction.

Ohio on June 22, 1933, enacted an extensive Milk Distribution Law, H. B. No. 671. The case of *State ex rel. Bricker v. Kroger Grocery and Baking Co.*, now pending before the Supreme Court of Ohio, apparently is an original proceeding of *quo warranto*, brought by the Attorney General of Ohio because a large chain store insisted upon selling milk cash-and-carry at one cent a quart under the delivered price.

Vermont on July 19, 1933, enacted a law to control the distribution and sale of milk, with power to the Milk Control Board to license dealers, fix prices to be paid producers and maximum and minimum prices for wholesale and retail sale. It has been applied in at least one large market.

Pennsylvania several months ago named a legislative committee to study the milk situation, and at the present session (November 1933) is considering enactment of a milk control law.

The *United States* included "milk and its products" among the seven basic agricultural commodities regulated under the Agricultural Adjustment Act of May 12, 1933. Under §8 the Secretary of Agriculture is authorized to enter into marketing agreements with persons engaged in "handling in the current of interstate or foreign commerce" any agricultural commodity, and to require licenses from all such persons. Under that authority milk marketing agreements have been entered into fixing buying and selling prices in

Chicago, Boston, Philadelphia and many other areas. The Chicago milk agreement has been upheld in the Supreme Court of the District of Columbia. (*Economy Dairy Company, Inc. v. Wallace;* Aug. 29, 1933; 41 Wash. Law Rep. 633; *Milton-Beck v. Wallace,* Aug. 29, 1933; 41 Wash. Law Rep. 833.) So has the Philadelphia milk agreement. (*Capital City Milk Producers v. Wallace,* Nov. 15, 1933.) Each of those opinions was by Mr. Justice O'Donoghue. A peach marketing agreement under the same Act was sustained by Judge Adolphus F. St. Sure, in U. S. District Court at San Francisco. (*United States v. Calistan Packers, Inc.,* Oct. 2, 1933.)

Such a common tendency in legislation is by no means conclusive as to its constitutionality, but neither is it insignificant. "Legislation so general marks a rising tide of opinion which is suggestive and informing." Judge Cardozo, in *Roman v. Lobe,* 243 N. Y. 51, 55.) Such a common tendency indicates at least that the legislation is responsive to "the felt necessities of the time" which "have had a good deal more to do than the syllogism in determining the rules by which men should be governed." (O. W. Holmes, Jr., "The Common Law," page 1.)

> "Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. * * * An historical justification of liberty of contract between landlord and tenant is not a demonstration that the system must survive every exigency. When it temporarily ceases to be adapted to the demands of the present it may be modified, if the best interests of society are thereby waived. 'An earnest conflict of serious opinion' may arise as to whether

such interests have been wisely served or whether the legislation is anything more than another example of misdirected zeal in dealing with a crisis. But that argument does not address itself to the court. 'The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*.' * * * The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law." (*People ex rel. Durham R. Corp. v. La Fetra*, 230 N. Y. 429, 446, 447, 450.)

The Usefulness of the New York Milk Control Law Has Been Demonstrated.

Governor Lehman signed the law on April 10, 1933. On April 12 he named a Director of Milk Control, thus completing the triumvirate Board. The Board held its first public hearing on April 13, and on April 14 it made Order Number Five (R 2) now involved, which became effective on April 17. That order, and the concurrent order for the Metropolitan Area, did not purport to raise prices. Although they had the effect of raising prices for some of the smaller cities and villages (and were below the existing prices in some others) they merely put into uniform effect the prices which were then the generally declared and recognized prices in all the larger cities of the State.

Those orders, merely stabilizing prices, unquestionably were beneficial to producers, and prevented the usual sharp decline of prices from March to April and from April to May. Effective May 16 the Board

established a price to be paid producers and advanced the price of milk in New York City a cent a quart. Effective July 21 the Board advanced the price of milk in all the larger cities one cent, making the price for Grade B sold out of a New York City store 11 cents (or 10 for an "unadvertised" brand) and 10 cents in the upstate cities. Delivered prices are 12 and 11 respectively, which is merely the price relationship which prevailed during nearly all of 1932, and considerably below the price for previous years. (Report, 181.) Apparently no consumer distress has resulted, and the consumption of milk has not been reduced appreciably. The New York Times in an editorial of Aug. 24 commented on the fact that only three "consumers" attended the public hearing next after the increase of July 21, and they were present to talk upon another matter.

Meanwhile milk prices to producers have increased about 80% above last spring, and about 30% above prices a year ago when milk retailed at the present price. The Dairy Farm Report for November, 1933, issued by U. S. Dept. of Agriculture in cooperation with N. Y. S. Dept. of Agriculture and Markets, gives the following as average prices actually received by New York State farmers per hundredweight of milk:

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1931	2.25	2.22	1.97	1.75	1.58	1.49	1.66	1.81	1.92	1.95	1.90	1.62
1932	1.61	1.58	1.48	1.30	1.16	1.07	1.10	1.22	1.30	1.34	1.40	1.29
1933	1.17	1.12	1.01	.99	1.18	1.37	1.55	1.79	1.77			

There has been no change in production or consumption sufficient to have any appreciable effect upon those prices. The price of butter has been slightly higher in 1933 than in 1932 but such increase is a very small factor in the above prices.

A computation has been widely published to the effect that the income of New York State dairymen for the five months, May to September inclusive, was $9,000,000 more in 1933 than in 1932, entirely as a result of activities by the Milk Control Board. See the United States News for November 18, page 12, and other publications of about that date. Other computations apparently on a conservative basis run as high as $16,000,000.

Governor Lehman, in his message to the Legislature on August 4, 1933, said: "As a result of the creation of the board the average price for milk products which the dairy farmers are now receiving is very substantially in excess of that previously ruling." 43 State Dept. Rep. 530, 531.

The essential fact that this law has been beneficial is common knowledge in New York State. Even in a constitutional litigation it is permissible, we hope, to mention the fact with some satisfaction, and with the belief that it reflects the care and thoughtfulness that went into the statute. Had the statute produced widespread distress we can be sure that fact would be adduced against it.

Summary of Argument.

POINT I. The necessity for any particular exercise of the police power is a matter to be determined in the first instance by the legislature. In the present case such a legislative determination has been made and no reason appears why it should be disturbed.

POINT II. The distribution of milk is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility.

POINT III. Fixing minimum prices to consumers is a common form of utility regulation.

POINT IV. The power to fix minimum prices to consumers is an important and desirable feature of the Milk Control Law. It has an actual relation to the public interest and should be sustained.

POINT V. The statute is constitutional and the judgment of conviction should be affirmed.

POINT I.

The necessity for any particular exercise of the police power is a matter to be determined in the first instance by the legislature. In the present case such a legislative determination has been made and no reason appears why it should be disturbed.

That the period 1930-1933 has brought this nation and every part of it some unprecedented problems is of course known to the Supreme Court of the United States. An opinion by the Chief Justice delivered on January 4, 1932, quoted an official report that "a depression such as the country is now passing through is a new experience in the present generation", and said that it was a matter of which the Court took judicial notice. "It is the outstanding contemporary fact, dominating thought and action throughout the coun-

try." (*Atchison etc. Ry. Co. v. U. S.*, 284 U. S. 248, 260). At the same term Mr. Justice Brandeis said, "The people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions." (*New State Ice Co. v. Liebmann*, 285 U. S. 262, 306).

There have been some developments since then, not all of a reassuring nature. The case of *Home Building & Loan Assn. v. Blaisdell*, No. 370 on the present calendar of this Court, on appeal from the decision reported in 249 N. W. at 334, is representative of a considerable number of recent statutes and decisions trying to do rough justice between debtor and creditor in a state of chaos, and representative of the period.

That agriculture has more than its share of the current troubles cannot be unknown. See "Legal Planning for Agriculture," by Farnsworth L. Jennings and Robert C. Sullivan, 42 Yale Law Journal (April 1933) 878; "Federal Farm Legislation: A Factual Appraisal," by Paul J. Kern, 33 Columbia Law Review (June 1933) 984.

The foregoing refers to the generalities of the present period. We need ask no benefit by inference from them in dealing with the specific problem now before the Court, because we present proof directed to the need for this specific statutory provision.

The Milk Control Law was designed and enacted for the purpose of regulating the price of milk in the State of New York temporarily and during a serious emergency. After a long and exhaustive investigation and study of conditions in the milk industry in the State the Legislature found and determined that such an emergency existed. It is within the power of the Legislature to make this finding a fact, which is at least highly persuasive.

> "Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the legislature. That it existed, promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation." (*People ex rel. Durham R. Corp. v. La Fetra*, 230 N. Y. 429, 440.)

> "While in theory it may be said that the building of houses is not a monopolistic privilege; that houses are not public utilities like railroads and that if the landlord turns one off another may take him in; that rents are fixed by economic rules and the market value is the reasonable value; * * * yet the legislature has found that in practice the state of demand and supply is at present abnormal; that no one builds because it is unprofitable to build; that those who own seek the utmost farthing from those who choose to live in New York and pay for the privilege rather than go elsewhere; and that profiteering and oppression have become general. It is with this condition and not with economic theory that the state has to deal in the existing emergency." (*Ibid.*, pages 443-444.)

> "Curative action is needed. While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience, and the public welfare and

advantage in the face of the extraordinary and unforeseen public exigency, which the legislature has, on sufficient evidence, found to exist." (*Ibid.*, Page 451.)

"No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts. (Citations omitted.) But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world." (*Block v. Hirsch*, 256 U. S. 135, 154.)

"Whether the manufacturer of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which

> the legislature has to promote the general welfare is very great and the discretion which that department of the government has, in the employment of means to that end, is very large." *(Powell v. Pennsylvania,* 127 U. S. 678, 685.)
>
> "When the bill was pending in Congress the Judiciary Committee of the House of Representatives held an extended public hearing, in which it received testimony, among other things, on the question whether beer and other intoxicating malt liquors possessed any substantial medicinal qualities. On the information thus received the Committee recommended the passage of the bill. * * * We find, on the whole, no ground for disturbing the determination of Congress on the question of fact as to reasonable necessity, in the enforcement of the 18th Amendment, of prohibiting prescriptions of intoxicating malt liquors for medicinal purposes." *(James Everard's Breweries v. Day,* 265 U. S. 545, 561, 563.)

See also *Chicago Board of Trade v. Olsen,* 262 U. S. 1, 10-15, 37-38.

It being accepted as a fact that a public emergency exists, and that the legislation is of a temporary nature, greater latitude than usual is permissible. This proposition received illustration in the case of *Wilson v. New,* 243 U. S. 332, sustaining the power of Congress to fix the standard of minimum wages for railroad employees during an emergency. That case was relied upon to support the emergency rent laws in *Block v. Hirsch,* 256 U. S. 135, 157, where the law was limited to two years, and it was said:

> "The regulation is put and justified only as a temporary measure. (Citations omitted.) A limited time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

In *Levy Leasing Co. v. Siegel,* 258 U. S. 242, 245, relative to those same rent laws, this Court said:

> "In terms the acts involved are 'emergency' statutes and, designed as they were by the legislature to promote the health, morality, comfort and peace of the people of the State, they are obviously a resort to the police power to promote the public welfare. They are a consistent inter-related group of acts essential to accomplish their professed purposes.
>
> "The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power."

The case of *Wilson v. New* was relied upon to support the same proposition in *People ex rel. Durham R. Corp. v. La Fetra,* 230 N. Y. 429, 445. Several times in that opinion the temporary character (for two years) of the rent laws was stressed. Thus, at page 449:

> "The State in an emergency caused by flood or fire, when multitudes are homeless, might concededly compel owners of houses to take in undesired occupants in order to shelter them from exposure to storm and cold. Why then would the State have no power reasonably to regulate for a time the terms upon which a landlord under such conditions

might put his tenants out when they promptly pay a reasonable compensation for the use of the property?"

The temporary and emergent character of the legislation being accepted, it is well within the scope of the police power.

"The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirements of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the State has surrendered one of the attributes of sovereignty for which governments are founded, and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare." *(People ex rel. Durham R. Corp. v. La Fetra,* 230 N. Y. 429, 443.)

"The police power is 'the least limitable of the powers of government.' (*District of Columbia v. Brooke,* 214 U. S. 138, 149.) It extends to all the great public needs. *(Camfield v. United States,* 167 U. S. 518.) The validity of police regulations must depend on the circumstances of each case and the character of the regulation whether arbitrary or reasonable. A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection." *(People v. Perretta,* 253 N. Y. 305, 309.)

See also, *Barbier v. Connolly,* 113 U. S. 27; *Manigault v. Springs,* 199 U. S. 473, 480; *C. B. & Q. R. Co. v. Illinois,* 200 U. S. 561, 592; *Noble State Bank v. Haskell,* 219 U. S. 104; *Eubank v. Richmond,* 226 U. S. 137, 142-143; *Atlantic Coast Line R. R. Co. v. Goldsboro,*

232 U. S. 548, 558; *Sligh v. Kirkwood*, 237 U. S. 52, 59; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 548; *Miller v. Schoene*, 276 U. S. 272, 279-280; *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 254, 260-262; *United States v. Macintosh*, 283 U. S. 605, 622.

POINT II.

The distribution of milk is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility.

The appellant presents one argument only, that the due process clause of the Constitution guarantees him the right to sell milk at a price of his own choosing, irrespective of the public need to the contrary amounting to an emergency. A State Board, authorized by the Legislature, has determined that a different price than Nebbia chooses is more in the public interest under present conditions. For the purpose of this judicial test of the appellant's proposition it is to be assumed that the Board is right. The appellant's position still is that it is the constitutional right of every tradesman, at all times and under all conditions, to fix the price for his commodities. This, he says, is a supreme good which cannot be set aside even upon the clearest demonstration that a temporary exigency calls for different treatment.

Undoubtedly self-regulation of business through free competition is a good worthy of considerable sacrifice, but it is not always the preponderant value.

(Stephenson v. Binford, 287 U. S. 251, 274.) It has been said that the Constitution is not "the partisan of a particular set of ethical or economical opinions." (Mr. Justice Holmes in *Otis v. Parker,* 187 U. S. 606, 609.) "We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power." *(Noble State Bank v. Haskell,* 219 U. S. 104, 110.) And no matter how great a value is set on free competition, some care must be taken not to strive for "a mere delusive liberty." "Realities must dominate the judgment," and this means that in a specific case it is necessary to consider the economic conditions peculiar to the industry, the practices which have obtained and other matters practically affecting the public interest. *(Appalachian Coals, Inc. v. U. S.,* 288 U. S. 344, 360-361.) Public utilities are businesses in which free competition works out badly, and accordingly they are controlled upon a different principle.

The factual material which is supposed to justify the application to the milk business of some of the forms of regulation ordinarily applied to a public utility already has been referred to in this brief, pages 8-21. The legal argument will be rested upon the brief of James T. Cross, Counsel to the Pitcher Committee (Report, 271-294; substantially the same material is referred to in the opinion below, R. 18) and upon an article by Henry S. Manley, printed as an appendix to this brief.

The article concludes with a reference to three cases which, it is said, "will require careful study in connection with the proposal to make the gathering and distribution of milk and milk products a public utility."

One of those cases was *Fairmount Creamery Co. v. Minn.*, 274 U. S. 1. The Minnesota statute there involved evidently was intended to prevent unfair competition in cream buying, but no record was available before the Court as to how the competition operated or how the statute would curb it.

In the case of *Williams v. Standard Oil Co.*, 278 U. S. 235, only a feeble case seems to have been presented for making the wholesale and retail distribution of gasoline in Tennessee a public utility. It was shown that the commodity was essential and widely dealt in. Although the answer and brief made some showing of monopolistic tendency it could be deduced from the Governor's message, which resulted in the statute, that this was an afterthought. Obviously less investment is required to vend a non-perishable commodity to persons who call at service stations for it than is needed to vend a perishable food in smaller units from house to house. No health aspect and no producer interest were involved.

In the case of *New State Ice Co. v. Liebmann*, 285 U. S. 262, this Court decided that the business of manufacturing ice and selling it is essentially a private business and not so affected with a public interest that the Oklahoma legislature could limit the number of those who engage in it, in order to control competition. Reading the majority and dissenting opinions, four things are apparent:

(a) The majority felt that there was no justification for making ice manufacture and distribution a public utility, because, unlike cotton ginning, it was not "a paramount industry upon which the prosperity of the entire state in large measure depends." (pages 276-277.)

(b) The majority felt that the ice business "is not the case of a natural monopoly" (page 279) because, although in the past ice production may have required an expensive plant, nowadays refrigeration by electricity or gas is a common household process. (pages 277-278.) The minority opinion also accepted the "natural monopoly" test (see page 282) but said that, "In Oklahoma the mechanical household refrigerator is still an article of relative luxury." (page 290, see also 291-299.)

(c) Perhaps the majority would have sustained price-fixing as to ice, but it was unwilling to sustain a direct and arbitrary limitation upon those who could enter the business. This was the statutory provision "immediately in question here." (page 272.) "The question here is whether the business is so charged with a public use as to justify the particular restriction above stated." (page 273.) The majority felt that this provision was "against the interest of the consuming public" (page 278), and it did not appear that any other public interest existed as to the ice business.

(d) The discovery that the ice business was public in nature seems to have been peculiar to Oklahoma in 1925 and Arkansas in 1929. (page 283.)

Any one of those considerations may have been decisive.

For the four reasons suggested above we believe that *New State Ice Co. v. Liebmann* is not at all deci-

sive of the question whether the business of milk distribution in New York State may be regulated generally along the lines of a utility, but without direct regulation as to the number of persons entering the business.

The Legislature of New York State found the following facts relative to the milk industry:

> "Unsettled market conditions have led to price wars among distributors which have caused reductions in retail and wholesale prices below the point justified by the supply and demand situation. Unfair and destructive trade practices have been more prevalent and more serious than usual in their effect upon the price structure." (Report, 15.)

> "It is hereby declared that unhealthful, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this State, whereby the dairy industry in the State and the constant supply of pure milk to inhabitants of the State are imperiled. * * * That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing."

That quotation is from the legislative finding and statement of policy in section 300 of the statute. The enactment itself expresses the legislative judgment as to the appropriate remedy, but it seems to us it was accurately forecast in a sentence of the same section:

> "That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, stor-

age, distribution and sale of milk in the State of New York *is hereby declared to be a business affecting the public health and interest.*" (Italics ours.)

The conclusions of the appended law review article about making milk distribution a public utility may be summarized as follows:

1. "There can be no doubt about its being a common necessity, so that the public is dependent upon those engaged in the milk business. The vast amount of legislation and litigation which have been expended upon it speak eloquently of the public interest in milk. It is difficult to conceive of a more essential commodity, unless it be water, and a greater proportion of our citizens are dependent upon milk dealers than are dependent upon a public water supply. Besides that dependence of our consuming population upon the milk business, our agricultural population is as dependent upon the milk plant as the pioneer was upon the grist-mill, as the farmers of Illinois were and are upon the grain elevator, as the farmer of Missouri upon the stockyard, as the farmers of Kentucky upon the tobacco warehouse, and as the farmers of Oklahoma upon the cotton gin."

2. "The milk business operates in such a way as to attain its greatest efficiency as a monopoly, and has the tendency to become one."

3. "The use which the milk business makes of the public highways probably amounts to as much in quantity, even if it is somewhat different in nature, from the use by the motor busses, the private contract motor carriers, or the taxicabs."

4. "The possibilities for abuses which exist in the milk business are numerous, and have resulted in its commonly being required to have

> permits and licenses in connection with many of its instrumentalities. * * * The milk business from beginning to end is the most completely regulated business in existence, except the railroads. Making it a public utility may be a decided change in the form of regulation, but it need not be a startling change in its extent."

It is respectfully submitted that the considerations which were decisive as to the ice business of Oklahoma are none of them applicable to the business of milk distribution in New York state; that the legislative finding that the latter is "*a business affecting the public health and interest*" has abundant support; that it is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility.

POINT III.

Fixing minimum prices to consumers is a common form of utility regulation.

The public utility concept in this country traces back to *Munn v. Illinois*, 94 U. S. 113. In that opinion Chief Justice Waite leaned upon the case of *Mobile v. Yuille*, 3 Ala. 140, 36 Am. Dec. 441, as an American authority for price-fixing. That case involved an ordinance of Mobile which fixed the price and weight of bread. Apparently the price fixed was both a maximum and a minimum, and the ordinance also required bakers to be licensed and pay a fee. This ordinance was held constitutional by the Supreme Court of Alabama in 1841. After discussing various English authorities, the court said:

"The sum of these authorities is that though there can be no general restraint of trade, yet to a certain extent it may be regulated, and by consequence to some extent restrained in a particular place, if such restraint be for the good of the inhabitants, as when, for the prevention of nuisances, certain trades are confined to the suburbs of a city, or where it is for the advantage of the trade and improvement of the commodity.

"The regulation in this case seems to combine all these qualities. Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of utmost importance; and whatever doubts may have been thrown over the question by the theories of political economists, it would seem that experience has shown that this great end is better secured by licensing a sufficient number of bakers and by an assize of bread, than by leaving it to the voluntary acts of individuals. By this means a constant supply is obtained without that fluctuation in quantity which would be the inevitable result of throwing the trade entirely open, and the consequent rise in price, when from accident or design a sufficient supply was not produced. The interest of the city in always having an abundant supply will be a sufficient guaranty against any abuse of the right to regulate the weight the consequence of which would be to drive the baker from the trade."

See also, *Guillotte v. New Orleans,* 12 La. Ann. 432, and *Slaughterhouse Cases,* 16 Wall. 36, which involved some similar legislation in Louisiana.

It is apparent that the Supreme Court of Alabama in 1841 correctly apprehended a principle of utility regulation not generally accepted for many years. In 1930 the Supreme Court of Montana had before it the

case of a gas company which insisted upon its alleged right to sell gas to consumers at a rate less than that fixed by the public service commission. (*Gr. Northern U. Co. v. Pub. Serv. Com'n*, 88 Mont. 180, 293 Pac. 294.) The court summarized progress in utility regulation as follows:

> "Legislation affecting public utilities, in its earlier stages, had as its chief purpose the prevention of exorbitant charges being made for the product furnished. As the field covered by these utilities broadened it became apparent that the public interest extended further than merely fixing of charges; that there was embraced as well the character of the service to be rendered, the kind of equipment employed; and that these things, and others, are so interdependent that one may not be intelligently regulated without control being exercised over the others. * * * Intermittent service is as costly, and at least equally detrimental to the public interest, as an exorbitant charge for the service."

Apparently the gas company was more successful in impressing its views upon a U. S. District Court of three judges, and the case came to this Court on appeal. (*Pub. Serv. Com'n v. Utilities Co.*, 289 U. S. 130.) This Court approved the position taken by the Montana court and reversed the District Court. The opinion noted that the gas company was claiming the "right to charge rates concededly less than reasonable rates" (page 134), and said (135-136):

> "But appellee, having undertaken to serve under conditions permitting competition, now insists that it has a constitutional right by unrestrained cutting of rates to destroy the competitor. And for that purpose it has made reductions from the 60 cent schedule in force until shortly before the Citizens Company entered the field to the flat rate

> of 15 cents, which yields less than the necessary cost of the service. The commission found that the rates specified in the 20 cent schedule are too low, unreasonable, liable to impair the service, and contrary to the public interest. The decision of the state supreme court is to the same effect. 88 Mont. 180, 218; 293 Pac. 294. The facts disclosed by the record are not sufficient to show that the exertion by the commission of its power to prescribe specific rates was arbitrary or an infringement of any constitutional right of the appellee."

The same general thought probably has been expressed many times in recent years. One of the earlier expressions is by Judge Crane, in *People ex rel. South Glens Falls v. P. S. Comm.*, 225 N. Y. 216, 222-223:

> "Reduction in rates seems to be generally recognized as a public benefit, and yet an increase may be equally so. * * * It is a bad political economist who thinks the public is always served best by that which is cheap."

To similar effect are the following quotations:

> "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety." (*Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456, 478.)

> "A little town with two utility companies might be likened to the owner of a menagerie, whose wild

animals are prone to fight if they come to contact. It is quite in the interest of the owner to prevent the contact." (*Town of Mapleton v. Iowa P. S. Co.*, 209 Iowa 400, 223 N. W. 476.)

The reason why fixing minimum prices to consumers is an important and desirable feature of the plan embodied in the Milk Control Law will be discussed under the next point. For the present, concluding under this point, we merely submit that fixing minimum prices has become a recognized and common form of utility regulation.

POINT IV.

The power to fix minimum prices to consumers is an important and desirable feature of the milk control law. It has an actual relation to the public interest and should be sustained.

Perhaps the fixing of maximum prices to be charged by those engaged in a business carries with it some obligation to fix minimum prices; if the profits to be had in a business are limited by law the government should protect from destructive competition those whose property is risked in the business. This is one view as to the justification for the provision now involved. "What was originally designed to provide immediate relief to the farmer became as well a vehicle for the protection of the distributor." (42 Yale Law Journal, 1265.) However, we believe that is not the real reason or principal justification for this provision. To the contrary, see the material quoted from the Report of the Pitcher Committee, at pages 18-21 of this brief.

As seen by the Legislature through the report of its committee, New York State had more milk than the available fluid markets could take (in the spring and early summer a double supply), nearly all produced under conditions that made it available for the fluid markets and competing for the premium to be obtained there. The distributors, down to the smallest store, carried on a brisk competition, but at the farmers' expense. Falling prices in the cities and villages, secret discounts and free milk and other price concessions, promptly were reflected in lower prices to farmers. In the four years from March 1929 to March 1933 the retail price of milk fell 37%, but the price paid to the farmers fell 61%. The dealers' margin was decreased only 17%. (Report, 15, 96, 181, 182.)

All agriculture is notoriously difficult to control through the law of supply and demand. This is true for a number of reasons, not the least important being that a farm is also a home and a farmer and his family will cling to the soil regardless of profit. Dairying is a branch of agriculture, and it is a biological industry, the "cow cycle" ordinarily being fifteen years from peak to peak. The dairy industry will destroy itself producing below the cost of production with no more manifestation of logical control than a herd of buffalo plunging over a cliff.

Milk is an ideal disease carrier and has need to be produced for the fluid market under safeguards which cost money and which cannot be maintained when the milk check is all absorbed in the feed bill. Milk is a perishable food and the presence of excess milk in a city market under ordinary conditions of human cupidity is a health menace.

The business of receiving and distributing milk requires a considerable investment of capital and its operating expenses are relatively constant per unit of sale. It is a natural monopoly of organization handling an essential commodity, and if it were compelled to accept its even share of such price reductions as those which occurred in the period 1929-1933, or were subjected to stress through the reverse condition of milk shortage, its tendency to monopoly would rapidly be realized and would be attended by various public distresses.

Primarily what the Legislature desired to accomplish was to save the dairy industry from destruction, by giving it a price for milk nearer to the cost of production. The direct approach to this problem was by setting a minimum price to be paid by distributors to producers.

Perhaps this simple approach would have been effective. The original form of the Pitcher bill, which contained no provision for fixing minimum prices to be paid by consumers, evidently intended this method of approach. Somebody must have been strongly impressed by the desirability of ending the destructive competition at the place where it was being waged, and so the minimum-price-to-the-consumer provision was added.

We believe it was a wise addition, as has been demonstrated by the prompt success which attended its original use by the Board. (See this brief, pages 27-28.) The distributors say that its exercise is essential to their protection. (42 Yale Law Journal, 1265.) At

least it is probable that retail prices of milk cannot be raised in line with other commodities without either the exercise of this power or else the usual strikes and disorders.

We submit that the power to fix minimum prices to consumers is an important and desirable feature of the statutory plan. It has an actual relation to the public interest and should be sustained.

POINT V.

The statute is constitutional and the conviction should be affirmed.

Respectfully submitted,

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APPENDIX.

CONSTITUTIONALITY OF REGULATING MILK AS A PUBLIC UTILITY*

HENRY S. MANLEY

Any proposal for reducing competitive costs in the marketing of New York State milk is a matter of tremendous concern to the people of the State.

At the present moment the *farmer* is most concerned, because present marketing conditions affect him most immediately and severely. Thirteen years ago in this same State there was talk of a milk famine, and the city dweller was most concerned. Ten years before that, in 1910, although the farmer was then being paid about a cent a quart more for his milk than he now is, it was asserted that he was being paid less than the cost of production. In 1910 Attorney General O'Malley investigated the milk business and recommended that it be regulated as a public service utility.[1] In 1920 the same recommendation was made by George Gordon Battle, Royal S. Copeland and Governor Alfred E. Smith.[2] The present crisis has caused the suggestion to be renewed.

Each swing of the pendulum, whether to low price or high, to surplus or shortage, brings out the fact there are certain persistent and expensive abuses in our system of marketing milk. At such a time it is possible to lay aside our usual smugness about the "American System" of Devil-take-the-hindmost, and consider whether the abuses and costs of the competitive system do not out-weigh its benefits, at least

* Distributed Jan. 19, 1933 in mimeographed form to N. Y. S. Breeders Associations. Printed XVIII Cornell L. Quarterly, April, 1933, page 410.

1 Senate Doc. No. 45 of 1910.

2 Legis. Doc. No. 29 of 1920.

relative to services and commodities which are universally essential to human existence.

We are familiar with the idea of the public service utility as applied to railroads, busses, telephones, telegraphs, water companies, gas and electric companies. Nobody would think of returning to the day of unrestricted competition in the serving of those public needs. At a time of trouble in the milk industry we naturally consider the possible application to it of the principles of public utility regulation. In 1920 the suggestion was advanced by the city dwellers, and now it is by the dairymen; if making milk a public utility will eliminate wasteful competitive costs of marketing without introducing other costs as great, all the public will gain by the change.

A strong argument can be made for the proposed change. If no milk receiving plant could be set up or operated without first obtaining a permit from some State agency, which has power to withhold the permit if the proposed territory for the plant already has adequate plant facilities, or if other plants already are supplying all the milk the market requires, we shall have curbed the competition which has caused so many unneeded and expensive plants to be erected and operated. The same regulation can be applied to distributors of milk and milk products. We may hope to see a fair price paid to the producer, and neither he nor the consumer will have the burden of supporting two plants side by side, or a multiplicity of executive organizations and sales forces. There is no more necessity for having half-a-dozen milkmen rattle through the same city street than there is for having it visited by half-a-dozen postmen; there is no more necessity for having two or three milk gathering trucks operate along the same country road than for having as many rural mail carriers.

Of course there is another side to the picture. You cannot give one milk plant the monopoly of serving a township, or one milkman the monopoly of serving a city block, without setting a limit upon the profits to be made by the monopoly you have created. Price-fixing by government necessarily means price-fixing through political processes. Many conservative people will be genuinely alarmed at having the State government, or any other, attempt fixing the price of any commodity, even such a prime essential as milk.

Proponents of the plan may urge that there is far more merit in direct limitation by the government of wasteful competitive processes, than there is for leaving those processes running wild and feeding them, on one side or the other of the struggle, many millions of taxpayers' money, as recently has been done for wheat in the United States and also in Canada. More remote and dubious arguments can be drawn from the tariff, ship subsidies, and other forms of governmental interference in the competitive struggle. It can be pointed out that this State, in the guise of emergency legislation, regulated the price of coal and other fuels in 1922–1923, and of rents in 1920–1929.

Weighing those arguments, so far as they may determine the *wisdom* of making milk a public utility, is not the present business. It may be deemed wiser to enact some form of regulation not quite so drastic, but even so, it is well to know where the constitutional limitation is drawn. Accordingly, this paper will take up the question whether the due process clauses of the State and Federal constitutions will permit milk to be made a public utility.

It is well established that the Legislature can regulate any business or profession to the extent necessary to curb practices which are to the serious disadvantage of the general public. Likewise, it is well established that the courts will jealously review such legislation when it is challenged before them, and in any case where they believe regulation has been carried beyond what is justified by the particular public interest involved, they may determine that the regulatory statute is unconstitutional. The judicial formula in such cases usually is to say that the operation of the statute as applied to an established business, takes without due process of law the property used therein, or as applied to a person prohibited from entering the business, it deprives him of liberty.

For many years admissions to practice medicine and the law have been regulated. In the complexities of modern life it has been found necessary to extend similar regulation to a great many other professions and businesses which require some special skill or capacity, or expose the public to some special risk. In New York State today there are half-a-hundred or more businesses in which a citizen cannot engage unless he first persuades some official or board that he possesses the requisite qualifications, and obtains a license or permit.

But it will be observed that any citizen possessing the appropriate qualifications can insist upon being licensed, and it is doubtful if the courts would sustain an arbitrary limitation of the persons licensed for such a profession or business to those determined by the licensing authority to be required by "public convenience and necessity". That is a further degree in

regulation, reserved for a limited class of businesses which are called public utilities, and are commonly said to be "affected with a public interest."

It is said that in colonial days, and in England at that time, it was common for legislative bodies to fix prices for all important commodities. A very different philosophy has grown up under the Constitution of the United States, and of this State. It has come to be accepted as the general rule, that so far as prices are concerned every business is a law unto itself. The tavern, the ferry, the toll-bridge, the toll-road, and the grist-mill probably were ancient exceptions to that rule, and there have long been laws regulating the rate of interest which may be charged on a loan. It was not until 1877 that our judiciary developed the concept of a "public utility" as a generic exception.

Shortly after 1870 there spread through the middle west a movement which became known as the Grange. It was somewhat associated with the Greenback movement, and was largely a protest against the unrestrained abuses of railroads, grain elevators, and other corporations. It succeeded in having passed by the Legislature of Illinois, and other states, laws fixing maximum fares and charges. There was tremendous public interest in the legal battle which followed. On March 1, 1877, the Supreme Court of the United States sustained the laws fixing rates for railroads, and also the Illinois law fixing the maximum charge which could be made by grain elevators. The latter decision, *Munn v. Illinois*,[3] is recognized as a landmark in constitutional law.

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[3] 94 U. S. 113 (1876).

The court in deciding that case, pointed out that the grain elevator business, established twenty years previously, had assumed immense proportions, was practically a monopoly, and "stood in the very gateway of commerce". The court said, "It is a business in which the whole public has a direct and positive interest", and announced the rule as follows:

> "When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created".

It was said at the time by dissenting judges, and has been repeated many times since, that the rule affords no adequate test for its application to other businesses, and indeed that it argues in a circle. Nevertheless, it has been applied to many businesses, new and old, and utility regulation gradually has assumed the form with which we are familiar today. The utility usually is given complete or partial freedom from competition, its rates are limited to those which will produce a "fair return", and it enjoys a judicial guarantee of minimum rates which will secure such a return.

There is no satisfactory definition of a public utility, and the degree of regulation which is appropriate to one utility may be inappropriate to another. Chief Justice Taft stated the matter as follows;

> "All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion, and to gradual establishment of a line of distinction. * * *"

> "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

That quotation is from his opinion, unanimously concurred in, in the case of *Wolff Packing Co. v. Industrial Court.*[4] That decision in 1923 held invalid a Kansas act attempting to fix wages paid by packers and in certain other essential employments involving the production of food and clothing. The Supreme Court expressly left open the question whether the preparation of food could be subjected to regulation as a utility, because even if it could there was no justification for carrying regulation of such a business to the extent of fixing wages.

The usual regulation characteristic of a public utility is to limit the field to those given certificates of public convenience and necessity, and to fix the prices at which they shall deal with the public. For purposes

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4 262 U. S. 522, 538-539, 43 Sup. Ct. 630, 634 (1923).

of this inquiry into constitutional law it will be assumed that such is the regulation to which it is desired to subject the business of gathering and distributing milk.

Regulation to that extent has been sustained by the Supreme Court of the United States as to common carriers of persons and goods, grain elevators, stockyards, water companies, toll-roads, toll-bridges, wharfs, ferries, insurance companies, banks, public warehouses, electric companies, gas companies, oil pipe-lines, telephone companies and telegraph companies. Recently it has been sustained as to cotton-gins in Oklahoma[5] and as to private contract motor carriers.[6] The power to establish maximum charges for service has been sustained as to livestock commission merchants[7] and as to insurance agents.[8] The same power has been denied as to theatre ticket brokers[9] and as to employment agencies;[10] similarly the power to limit profits of gasoline selling companies has been denied.[11] A statute attempting to regulate as a public utility the ice business in Oklahoma, has been held unconstitutional.[12]

It is somewhat difficult to deduce from those cases any set rule as to what characteristics justify classifying a business as a public utility. Perhaps those cases

5 Frost v. Corporation Comm., 278 U. S. 515, 49 Sup. Ct. 235 (1929).

6 Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 181 (1932).

7 Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1930).

8 O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931).

9 Tyson & Bro. v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

10 Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928).

11 Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115 (1929).

12 New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

merely illustrate the "process of exclusion and inclusion", of which Chief Justice Taft spoke, and have not yet accomplished the "establishment of a line of distinction." However, already some points along the line can be made out.

Two characteristics almost invariably are found in connection with any business regulated as a public utility. *First*, it supplies some common necessity, so that the public generally is dependent upon it. Probably all the businesses mentioned above, and many others, have that characteristic, in varying degrees.[13] *Second*, its method of operation is such as to attain its greatest efficiency as a monopoly. Corporations supplying gas, electricity and water are not more essential than those supplying coal[14] or flour[15] or gasoline[16] but a distinction can be based upon their manner of doing business. A gas company, an electric company, a water company, a common carrier, a telephone company or a radio broadcasting company, because of the common interests it serves and because of the manner in which it operates, tends to become a monopoly through a bitter and expensive competitive struggle. It is a matter of experience that grain elevators, warehouses, stockyards, grist-mills and cotton-gins frequently manifest the same tendency when located in a community which is greatly dependent upon them. In the past the same evils have not been experienced relative to common businesses such as the grocer, the baker, and the butcher, who require a comparatively

[13] See on this point Robinson, The Public Utility: A Problem in Social Engineering (1928) 14 Cornell Law Quarterly 1, at 9; Robinson, The Public Utility in American Law (1928) 41 Harv. L. Rev. 277; Hamilton, Affectation With Public Interest (1930) 39 Yale L. J. 1089.

[14] See Jones v. Portland, 245 U. S. 217, 38, Sup. Ct. 112 (1917).

[15] See Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. 499 (1920).

[16] See Standard Oil Co. v. Lincoln, 275 U. S. 504 (1927).

small outlay to do business, and until the advent of the chain, those have displayed no tendency towards monopoly.

Besides those two common characteristics of a public utility, certain other characteristics when present in a business aid to the conclusion that it may appropriately be subjected to such regulation. *Third,* the tendency of a business to peculiar abuses, such as any business in which people put a special trust, either as to their health or their property, tends to justify regulation of some sort, which may the more readily take the form of utility regulation. *Fourth,* if the business depends for its operation upon the possession of special franchises, or the power of eminent domain, that fact strongly tends to the conclusion that it may not complain if it is regulated as a public utility. Mere use of the public highway for its profitable business tends to the same conclusion. In *Stephenson v. Binford,*[17] discussing a private contract motor carrier, the matter was stated as follows:

> "It is well established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the Legislature may prohibit or condition as it sees fit."

All of those tests have some application to the business of gathering and distributing milk.

There can be no doubt about its being a common necessity, so that the public is dependent upon those engaged in the milk business. The vast amount of legislation and litigation which have been expended upon it speak eloquently of the public interest in milk. It is difficult to conceive of a more essential commod-

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[17] Supra note 6 at 264, 53 Sup. Ct. at 184.

ity, unless it be water, and a greater proportion of our citizens are dependent upon milk dealers than are dependent upon a public water supply. Besides that dependence of our consuming population upon the milk business, our agricultural population is as dependent upon the milk plant as the pioneer was upon the grist-mill, as the farmers of Illinois were and are upon the grain elevator, as the farmer of Missouri upon the stockyard, as the farmers of Kentucky upon the tobacco warehouse, and as the farmers of Oklahoma upon the cotton gin.

The milk business operates in such a way as to attain its greatest efficiency as a monopoly, and has the tendency to become one. This is not to say that it is now being monopolized in New York State; on the contrary the milk business appears to be engaged in one of those expensive and destructive struggles by which monopoly comes into being. In other states the tendency of the milk business to monopoly has been observed. The dairy companies of Colorado successfully challenged the anti-trust law of that state, because it was too vague in terms.[18] Minnesota failed in its attempt to regulate unfair competition in cream buying because it did not, or could not, put into the record evidence as to how the competition operated and how its statute would curb it.[19] In New York State in the past the milk business has shown its monopolistic tendencies more obviously than at the present time, and it should be possible for the Legislature to act upon that experience, in reasonable anticipation of evils to come,

[18] Cline v. Frink Dairy Co., 274 U. S. 445, 47 Sup. Ct. 681 (1927).
[19] Fairmount Creamery Co. v. Minn., 274 U. S. 1, 47 Sup. Ct. 506 (1927); cf. State v. Central Lumber Co., 226 U. S. 157, 33 Sup. Ct. 66 (1912) and O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 51 Sup. Ct., 130 (1931).

without exposing the citizens of this State to a complete repetition of them.

The use which the milk business makes of the public highways probably amounts to as much in quantity, even if it is somewhat different in nature, from the use by the motor busses, the private contract motor carriers, or the taxicabs. Aside from that use of the highways there is nothing about the milk business requiring special franchises or the right of eminent domain.

The possibilities for abuses which exist in the milk business are numerous, and have resulted in its commonly being required to have permits and licenses in connection with many of its instrumentalities. The health of cattle is a matter of public concern, justifying drastic regulation.[20] Cow-barns are regulated. A milk plant operator must give a bond and be licensed. This law was sustained in *People v. Perretta*,[21] and in his opinion Chief Judge Pound mentioned that there are "conditions of the market peculiar to milk", and the law is designed not merely to protect the farmer, but "to keep open the stream of milk flowing from farm to city." The plant manager must be licensed, and so must the persons making fat tests and bacterial counts, and they are required to report their tests and counts correctly, and keep certain records. There are numerous regulations affecting every phase of the milk business, sanitary and economic, from the time the cows are brought to the barn for milking to the time the empty bottle is returned to the licensed milkman. One dealer is forbidden to use, without permission, the marked bottles and other equipment of an-

20 People v. Teuscher, 248 N. Y. 454, 162 N. E. 484 (1928).
21 253 N. Y. 305, 171 N. E. 72 (1930).

other, and the constitutionality of that law has been sustained.[22] The milk business from beginning to end is the most completely regulated business in existence, except the railroads. Making it a public utility may be a decided change in the form of regulation, but it need not be a startling change in its extent.

In sustaining the constitutionality of a law under which the license of a milk plant operator was revoked for over-reading the Babcock test of cream purchased the Supreme Court of North Dakota said:[23]

> "The creamery business is essentially a business which is affected with a public interest, and as such is generally subject to governmental regulation. * * * * The purpose of the statute, indeed, is well known, and is to build up and to develop the dairying and stock raising industries of the state. It is to destroy the unfair competition by which the financially stronger foreign creameries, and butter and cheese and ice cream factories, may destroy those of this state by overgrading or overmeasuring until the local creameries are driven to bankruptcy, and then control the grades and prices. * * * Licenses, indeed, may be imposed not merely for the purpose of acting as temporary permissions to engage in harmful occupations, but in order to so control those that are useful that their operation may be harmless, and that they may really subserve the public good, which, after all, is the basis of all property rights."

While the cases of *Fairmount Creamery Co. v. Minn.*,[24] *Williams v. Standard Oil Co.*,[25] and *New State Ice Co. v. Liebmann*,[26] all referred to above, will re-

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22 People v. Ryan, 230 App. Div. 252, 243 N. Y. Supp. 644 (4th Dept. 1930).

23 Cofman v. Osterhaus, 40 N. D. 390, 400, 401, 168 N. W. 826, 828, 829, 18 A. L. R. 219 (1918).

24 Supra note 19.

25 Supra note 11.

26 Supra Note 12.

quire careful study in connection with the proposal to make the gathering and distribution of milk and milk products a public utility, it is probable that such a statute, if the facts in justification of it are carefully made of record by a legislative report or otherwise[27] will be held by the courts to be constitutional.

At least three experiments along the line of making milk a public utility have been attempted already. In November, 1931, the city of Portland, Oregon, passed an ordinance requiring milk dealers to file their prices with the city auditor, and to file all changes in price seventeen days before they should be effective. Early in 1932 the Province of Manitoba, Canada, amended its Public Utilities Act and authorized the Public Utilities Board of the Province, in case of an emergency when producers and distributors could not agree upon a fair price for milk, to control the buying and selling of that commodity. The Board's power has been exercised by an order of September 2, 1932, establishing a $1.55 per hundred price for 3.5 milk in Winnipeg area (an increase from less than a dollar a hundred before the order) and establishing retail prices of ten cents a quart delivered, or eight cents a quart at the stores.

In December, 1932, the Attorney General of Wisconsin advised the commissioners of agriculture and markets of that state that their power to regulate "unfair trade practices" included power to fix prices to producers for milk to be sold in fluid form within the city of Milwaukee. By an order of December 27, 1932, the commissioners fixed such prices.

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27 See H. W. Bikle, Judicial Determination of Questions of Fact Affecting Constitutional Validity of Legislative Action (1924) 38 Harv. L. Rev. 6.